71-1656

Supreme Court, U. S.
FILED
JUN 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

JOEL ACHTENBERG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner Joel Achtenberg respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in the above-styled cause, rendered April 3, 1972, and the denial of Petitioner's Petition for Rehearing or for Transfer and Rehearing by the Court En Banc, entered on May 23, 1972.

OPINION BELOW

The District Court did not write a formal opinion. The opinion of the Court of Appeals is not yet officially reported and is set out in the Appendix hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on April 3, 1972. Appellants' Petition for Rehearing and for a Rehearing by the Court En Banc was timely filed and was denied on May 23, 1972, and this Petition for Certiorari was filed within 30 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 2153(a) is void for vagueness and overbreadth, in violation of the Fifth Amendment to the Constitution of the United States, as construed in connection with 18 U.S.C. §§ 2151 and 2155?

2. Whether the government failed to prove its case under 18 U.S.C. § 2153(a), as a matter of law because:

(a) ROTC training is not "defense activities" as narrowly defined under 18 U.S.C. § 2151?

(b) Articles intended for training ROTC cadets are not "war materials" as defined under 18 U.S.C. § 2151?

(c) Buildings owned by a private university and used for ROTC courses are not "war premises" as defined under 18 U.S.C. § 2151?

(d) Objection to ROTC on campus and knowledge that a campus building may be connected with ROTC is not substantial evidence on which to find that an attempt to injure an ROTC building or articles therein is "with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for and carrying on defense activities", as required by 18 U.S.C. § 2153 (a)?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 2151. Definitions

As used in this chapter:

The words "war material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all articles, parts or ingredients, intended for, adapted to, or suitable for the use of the United States or any associate nation, in connection with the conduct of war or defense activities.

The words "war premises" include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States, or any associate nation.

The words "war utilities" include . . . (balance of paragraph omitted as irrelevant).

The words "associate nation" mean any nation at war with any nation with which the United States is at war.

The words "national-defense material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distrib-

uting, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

The words "national-defense premises" include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States.

The words "national-defense utilities" include . . . (balance of paragraph omitted).

As amended June 30, 1953, c. 175, §§ 2, 7, 67 Stat. 133, 134; Sept. 3, 1954, c. 1261, Title I, § 101, 68 Stat. 1216.

18 U.S.C. § 2153. Destruction of war material, war premises, or war utilities

(a) Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both.

(b) (Not relevant).

As amended June 30, 1953, c. 175, §§ 2, 7, 67 Stat. 133, 134; Sept. 3, 1954, c. 1261, Title I, § 102, 68 Stat. 1217.

18 U.S.C. § 2155. Destruction of national-defense materials, national-defense premises or national-defense utilities

(a) Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) (Not relevant).

As amended Sept. 3, 1954, c. 1261, Title I, § 104, 68 Stat. 1218.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .".

STATEMENT OF THE CASE

Petitioner was convicted by a jury on an indictment charging violation of 18 U.S.C. § 2153(a) and sentenced to "imprisonment, straight sentence, for a period of 15 years" (69)[1]. The indictment charges (13):

> "That on or about May 4-5, 1970, at which time there was in force and effect at all times a state of national emergency proclaimed by the President of the United States, at St. Louis County, in the State of Missouri, and within the Eastern District of Missouri,

1. References to pages in appendix on appeal are designated (.....)

with reason to believe that his act might injure, interfere with and obstruct the United States in preparing for and carrying on defense activities, did willfully attempt to injure and destroy, by fire, war premises and war material as defined by Section 2151, Title 18, United States Code, to wit: the United States Army Reserve Officers Training Corps facility at Washington University, St. Louis County, Missouri, and articles contained therein, intended for the use of the United States in connection with defense activities.

"In violation of Section 2153(a), Title 18 United States Code."

This case arose out of a series of incidents occurring on the Washington University campus in St. Louis during the late evening of May 4, 1970, and the early morning of May 5, 1970. A confrontation of students by troops at Kent University on May 4, 1970, had resulted in the death of four students. Students assembled at the quadrangle on the Washington University campus to protest the Kent incident, the presence of ROTC on the campus and the conflict in Vietnam. Shortly before midnight the assembled crowd, including the defendant, proceeded to the area on the campus where the Air Force and Army ROTC buildings are located. Various destructive activities occurred, including setting fire to the Air Force ROTC building and the Army ROTC building. The charges against the defendant relate only to the Army ROTC building.

Defendant appeared as a witness and admitted participating in the march and demonstration but denied that he carried fire to the building or that he commenced any fire in the building, or that he had entered the building.

Evidence was received that an attempt had been made to burn part of the gun cage in the ROTC building and that a two-by-four partition board was charred, and that two fatigue uniforms were burned.

The Army ROTC building belongs to Washington University. It is not a government building. It was used principally for ROTC training. Certain supplies in the building were property of the United States. An inventory of such property received in evidence discloses that the building contained 47 M-1 and M14 rifles, office supplies, equipment, helmets, tents, uniforms and other equipment.[2]

Petitioner "felt ROTC was not an activity that deserved academic credit or any place as a part of the University community" (194). He knew the building was a storage shed and thought it might be connected with ROTC (190). He testified he had never been in the building (186).

On appeal the case was reversed and remanded for a new trial.

REASONS FOR GRANTING THE WRIT

The trial court and the appellate court have decided two important questions of federal law, as set out in the Questions Presented For Review. Neither of them have been passed upon by this court and should be, for the reasons stated herein.

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2. The above portion of the statement of the case is taken verbatim from the opinion of the Court of Appeals.

I

Statute under Which Petitioner Was Indicted Is Unconstitutionally Vague and Overbroad.

18 U.S.C. § 2153(a), is void for vagueness and overbreadth in violation of the Fifth Amendment to the Constitution of the United States because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971). A criminal statute must be strictly construed. *U. S.* v. *Williams*, 341 U.S. 70 (1951). The constitutional prohibitions strike down a statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391-2 (1926). *Connally* recognizes that certainty may be provided by phrases having a technical or special meaning well enough known to enable those within their reach to correctly apply them, or a well settled common law meaning, but that some standard of conduct must be afforded from the text of the statute or the subjects dealt with.

The vague terms are "defense activities", "reason to believe", "national emergency", "preparing for", "war material" and "war premises". Both the terms themselves, and the manner in which they are interlinked or applied in the statute, create the constitutional infirmity.

The exact meaning of the term "defense activities" as statutorily applied is critical. One essential element of the offense under § 2153(a) is that the act be with intent or reason to believe that it would interfere with "*defense* activities". The phrase is again used in § 2151 in defining war material as articles "intended for use in connection with *defense* activities", injury to "war ma-

terial" being a second essential element of the offense. Thirdly "war premises" includes buildings in which war material is stored. The scope of "war premises" thus depends on the definition of "war material" which, in turn, depends on the meaning of "defense activities". Although the meaning of "defense activities" is thus critical, the statute contains no definition. Today, when the amount allocated for defense consists of a major portion of the nation's economy, there is little, if any, activity which has no connection with defense activities. The term is so vague and broad as to include almost any act. It has no well known special or technical meaning nor any well settled common law meaning. It is capable of dragging almost anything within its confines. It gives no notice of the conduct it forbids and furnishes no standards of conduct forbidden.

What is "reason to believe"? Without statutory definition, does it mean "knowledge", "reasonable suspicion", "practically certain" or what? Does it mean defendant must have reason to believe that his act would cause substantial injury or minor damage? None of these questions are answered by the statute. Some state of mind or information is apparently required, but how much? And as to what? What was the mens rea required? No cases define the term.

"National emergency" is also vague. True, it is limited by the terms "as declared by the president". We are usually in a "national emergency" of some sort, but what type is contemplated and when does it end? To lend clarity to the term must not the declaration specify an ending event or date?

"Preparing for" is likewise vague. One knows when the nation is "carrying on" a war, but when does it begin preparing for war? That point is impossible of determi-

nation without statutory declaration. Where the statute says "preparing for . . . defense activities" the term becomes even less subject to any standard. If "defense" means "war" it is vague. If "defense" means "preparation for war", when does one prepare to prepare?

§ 2151 attempts to define "war material" and "war premises" but they remain vague and overbroad. The definition of "war material" includes "all articles . . . adapted to or suitable for the use of the United States . . . in connection with the conduct of . . . defense activities". This has two infirmities. First, it is dependent on the term "defense activities". Second, it depends on the meaning of "adapted to or suitable for", which would include almost anything and gives no standard. It includes articles also adapted or suitable for non "defense" uses. "War premises" even as defined remains uncertain because it may depend on the vague terms "defense activities" and "war materials." Neither "war material" nor "war premises" has any well known technical or special meaning or any well settled common law meaning. They are so broad and vague as to include almost any structure, place or article.

A statutory definition does not remove the constitutional infirmity if the definition also is subject to the infirmity. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

The statute fails to define with sufficient precision exactly what is proscribed. It leaves to the court and jury a wide discretion in determining, not only whether the accused did, or did not do, a particular act, but whether the act done is encompassed by the statute. "We should not derive criminal outlawry from some ambiguous implication." *Toussie* v. *U. S.*, 397 U.S. 112, 122 (1970).

The vagueness of this statute is dramatically demonstrated by the wide range of sentences (90 days to 15

years) imposed by different federal judges in the four cases arising out of the same events in which each defendant was indicted for violation of § 2153. Four judges of more than common intelligence, viewed this statute with widely different meanings and application.[3]

II

The Evidence Failed to Make a Case under 18 U.S.C. § 2153(a) As a Matter of Law.

18 U.S.C. § 2151 separately defines and differentiates between "war premises and war materials" (required under 18 U.S.C. § 2153 under which petitioner was tried) and "national-defense premises and national-defense materials" (under § 2155); and fails to define "defense activities", an essential element under § 2153(a). Petitioner's position is that the ROTC building and contents were at most "national-defense premises and national-de-

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3. *U. S.* v. *Rudofker,* No. 70 CR. 170(3) (D.C.E.D.Mo. E. Div.) had one count of destruction by fire of the Air Force ROTC building and articles therein under § 2153 and a second count of destruction of government property under § 1361. After four days of evidence by the government Rudofker pleaded guilty to the second count and was placed on three years probation by District Judge Regan, after serving a 90 day evaluation period.

U. S. v. *Eisenberg,* No. 70 CR. 233 (D.C.E.D.Mo. E. Div.) (tried in Sept. 1971) had two counts under § 2153 charging attempted burning of both ROTC buildings. Found guilty of attempted burning of the Air Force building, he was sentenced by District Judge Webster to one year, six months of the sentence was suspended and he was placed on three years probation.

U. S. v. *Bland,* No. 70 CR. 168(1) (U.S.D.C.E.D. Mo. E. Div.), charged two counts under § 2153(a) of destruction of the Air Force ROTC building, and attempted destruction of the Army ROTC building and a third count under § 1361, of destruction of government property. On May 20, 1971 after four days of trial he pleaded guilty to the second count, under § 2153(a) of attempt on the Army ROTC building and was sentenced to 10 years by District Judge Meredith.

Defendant here received 15 years for only one offense, "attempt" on the Army ROTC building with minor damage (probably under $100), as opposed to the others charged with the Air Force ROTC building, in which the south end and its contents were totally destroyed, and who received the smallest sentences, 90 days and 6 months.

fense materials" which would support only a conviction under § 2155 and not "war materials and war premises", essential elements under the more serious statute, § 2153(a). The Appellate Court's opinion (Appendix) finds that:

> "National defense materials are defined in § 2151. The definition clearly includes much of the government property such as guns and clothing stored in the ROTC building. National defense premises as defined in § 2151 include places where national defense material is stored."

The Court thus found that the evidence only supported a charge under § 2155, i.e. an attempt to injure "national-defense material" and "national-defense premises", and did not support the element of "war material and war premises" necessary under § 2153(a).

A. The Premises and Material in Evidence Were Not "War Material" or "War Premises".

In interpreting a *criminal* statute the Court must apply the *most lenient* interpretation. *Ladner* v. *U. S.*, 358 U.S. 169, 178 (1958).

The meaning of "defense activities" interlinks with that of "war material" and "war premises". As properly defined the term means activities *directly* related to war activities. The legislative history shows that the term did not enlarge the meaning of "war activities" except to cover undeclared wars. On July 3, 1952, Congress first amended § 2153(a) to add the words "or defense activities" following "carrying on the war". Also § 2151 was amended so that "or defense activities" would follow "carrying on the war", in the definition of "war material". Emergency Powers Continuation Act, 66 Stat. 330 (H.J. Res. 477, 82d Cong., 2d Sess.). Since the Korean con-

flict was regarded as an undeclared war, the phrase "defense activities" was added as a euphemism for "undeclared war". This is made clear by the committee report on H.J. Res. 477:

> "The committee recommends the continuation of these provisions, with amendments to clarify the application of certain phrases to a period in which there is no formally declared state of war."

The earlier Committee Hearings on H.J. Res. 386 Before Subcommittee No. 4 of the House Comm. on the Judiciary, 82d Cong., 2d Sess. [1952] indicate the same concern. Remarks of Congressman Kneip (pp. 577-78). Mr. Feighan said:

> "We are not in a declared state of war, consequently we have changed the verbiage in this resolution to make it appropriate to a period where there is no declared state of war." Cong. Record-House June 11, 1952, pp. 7062-3.

Applying this meaning of "defense activities" there was no substantial evidence that the articles in the Army ROTC building were "war material" or that the building was "war premises". The alleged "war material" were articles in the Army ROTC facility intended for training ROTC cadets. These articles were not "war material" which must be defined to be articles intended for use directly connected with declared or undeclared war activities.

Four decided cases dealing with "war material", under other statutes, all relate to articles *directly* intended for use by the active armed forces in the conduct of a war. *U. S.* v. *Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946) (bombs and grenades, during World War II

intended for Army use); *Moore & Tierney* v. *Roxford Knitting Co.*, 250 Fed. 278, 287 (1918) (in World War I, underwear for Navy men); *Schmeller* v. *U. S.*, 143 F.2d 544 (6th Cir. 1944) (castings for military aircraft engines in World War II); *Roedel* v. *U. S.*, 145 F.2d 819 (1944) (destruction by a Nazi Storm Trooper of war material stored in a shipyard warehouse, during World War II).

The act was intended to apply only to material *directly* related to actual military activities. In the legislative discussion of the Act of 1918 (56 Cong. Rec. 3114) Representative Volstead in support of the Act said:

> "The original bill was much more comprehensive In some respects, in fact it seemed to be broad enough to cover anything in the United States. The Committee has modified it by limiting the scope of the bill to those things which are being used *more directly* by the Government in carrying on the war." (Emphasis added).

Under the narrow construction applied by the courts and indicated by the legislative intent, articles in a university-owned ROTC building were not *directly* connected with "defense activities". So defined, the evidence failed to establish that "war materials" were involved. There was no evidence that anything in the building was of the type, style, design, model or condition intended for use in offensive or defensive combat activities. The only evidence was that the articles were for "training ROTC cadets".

The statutory definition of "war premises" is in § 2151. The premises here could not possibly come within the premises there specified. There was no substantial evidence that it was a "building wherein war material is stored" or "an installation of the Armed

Forces". The buildings and land were owned by the university and used for accredited ROTC courses and other university courses. The building was not an installation of the "Armed Forces" because ROTC is not a part of the Armed Forces. As defined by 10 U.S.C. § 101(4) and again in 22 U.S.C. 2403 "Armed Forces means the Army, Navy, Air Force, Marine Corps and Coast Guard". ROTC is not included. In *Allison* v. *U. S.*, 426 F.2d 1324, 1326 (6th Cir. 1970), the court said:

> "this section [10 U.S.C. § 1475(a) (4)] distinguishes between members of the armed forces and reserves and members of ROTC. . . . The legislative history of the Act indicates a belief on the part of members of Congress that ROTC students are not members of the armed forces."

Nor was the Army ROTC building a building in which "war material" was stored, because there was no substantial evidence that the articles in the building were "war material".

In *Gorin* v. *U. S.*, 111 F.2d 712, 717 (9th Cir. 1940), involving an earlier Espionage Act, the court approved a lower court instruction which read:

> "You are instructed that the term 'national defense' includes all matters *directly* and reasonably connected with the defense of our nation against its enemies." (Emphasis added).

Applying the narrow meaning of "defense activities" there was no substantial evidence that the articles in the Army ROTC building were "war material" or that the building was "war premises". *Gorin* points out that things once "connected with the national defense may have lost such connection", using a flintlock as an example.

While not so extreme an example, M-1 and M-14 rifles and other obsolete equipment, here used to train ROTC cadets, had lost any direct connection with "defense activities".

B. 18 U.S.C. §§ 2153(a) and 2155 Involve Different Premises and Materials.

A statutory distinction is made between "war material and premises" and "national-defense material and premises". § 2151 defines both. "War material and premises" relate to use "in connection with the conduct of war or defense activities", and "national-defense material and premises" relate to use "in connection with the national defense". Since the statute uses two categories, there must be a distinction. "War or defense" relates *directly* to military activities. "National defense" covers the broader area of preparedness, not directly connected with actual combat activities. Under the offense sections the distinction is significant. § 2153 involves offenses against "war material" and a 30 year maximum sentence. § 2155 involves offenses against "national-defense material" and a maximum 10 year sentence. If Congress intended no difference between "national-defense premises and material" and "war premises and material", there was no reason to define these terms separately.

Recent cases indicate that Army, Navy or Air Force combat equipment, during the present emergency, are not "war material" but rather "national defense material" under § 2155, where not employed in a direct combat mission. See *Melville*, *Stewart*, *Meeker* and *Reys*, infra, all tried under § 2155, not § 2153. *Melville* involved an attempt to destroy Army trucks being used by the National Guard. *Stewart* and *Meeker* involved damage to Navy airplanes whose mission was the air defense of

the U. S. *Reyes* reversed a conviction on appeal for failure to admit evidence as to the mission of a B-52 Air Force aircraft damaged by an Air Force enlisted man.

18 U.S.C. § 2153(a) has been in effect since 1952 in its current form yet there are no reported cases under that section except those arising out of the instant episode, despite a long series of destructive activities against ROTC, draft boards, Armed Forces Induction Centers, etc.

C. 18 U.S.C. §§ 2153 and 2155 Are Both in Effect in Times of National Emergency.

In at least five cases since 1960, during the same "national emergency", charges have been brought under § 2155. See *U. S.* v. *Melville,* 309 F. Supp. 774 (D.C. N.Y. 1970); *U. S.* v. *Stewart,* 19 U.S.C.M.A. 417, 42 CMR 19 (1970); *U. S.* v. *Meeker,* NCM 63-00102 (NBR April 19, 1963); and *U. S.* v. *Reyes,* 30 CMR 776 (A F B R 1960). In *U. S.* v. *Siskind,* Case No. 68 CR. 283(1) (D.C.E.D.Mo. 1970), involving an earlier ROTC episode at Washington University, the charge under 18 U.S.C. § 2153(a) was dismissed and District Judge Harper accepted a guilty plea under § 2155.

On December 11, 1941, during World War II, President Roosevelt issued Executive Order No. 8972, which authorized the Army and Navy to maintain military guards over *"national-defense material"* and *"national-defense premises"*. President Roosevelt's *wartime* concern for "national-defense premises" and "national-defense material" makes clear that they are not just peacetime equivalents for "war material, etc.", but that the two categories involve different material and premises and co-exist in time of war.

The remarks of Congressman Rogers, Congressional Record-House, July 8, 1954, page 10110, are significant:

> "Certain acts of sabotage, *occurring at any time* would be punishable by not more than 10 years' imprisonment or not more than $10,000 fine, or both." (Emphasis added).

If § 2153 and § 2155 are concurrently in effect and a charge can be brought under either, there must be a distinction between "war material and premises" (§ 2153) and "national-defense material and premises" (§ 2155). Otherwise two statutes in effect penalize the same factual offense, one with a maximum penalty of 10 years and the other 30 years. *Bell* v. *United States*, 349 U.S. 81, 83, said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

Narrowly and leniently construing §§ 2151 and 2153(a) there was no substantial evidence that the building was "war premises", the articles therein "war materials" or that ROTC courses are "defense activities".

D. No Substantial Evidence of "Reason to Believe".

The indictment charges that defendant acted "with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for and carrying on defense activities". There was no substantial evidence as to this essential element. To come under the language of the indictment defendant must have had reason to believe that his act would cause *substantial* damage to property *directly* related to defense activities. Defendant did not participate in planning the rally of May 4-5 and did not know it was planned or that it would end up at the ROTC facilities (182). It was a spontaneous

reaction of many people to the student deaths at Kent State that noon. There was no evidence of any calculated intent of defendant to specifically interfere with the war effort. His participation in the demonstration was based on his feeling "that ROTC was not an activity that deserved academic credit or any place as a part of the University community" (194). It was a method of expressing a protest—not an effort to interfere with the war. Originally a candelight vigil at St. Louis University was proposed, then that the vigil be at the Washington University ROTC area (190). As to the Army ROTC shed, the only evidence as to defendant's knowledge of its use and contents was that he understood that it was a storage shed. He was not sure what was stored in it but thought it might be connected with ROTC (190).

The offense is a severe one and must be strictly and narrowly construed. So construed there is wide difference between acts of protest against ROTC on campus or against student deaths at Kent State, and acts which would reasonably be believed to directly and substantially interfere with combat activities. The Court made a comparable distinction in *Cramer* v. *U. S.*, 325 U.S. 1, 45 (1945), holding that treason involved "aiding adversaries of the United States" which is *not* the same thing as "injuring our country". In *U. S.* v. *Drummond*, 354 F.2d 132, 152 (1965), the court, citing *Cramer*, supra, said "The differences may not be very great between . . . injuring our country and aiding our adversaries. But the Supreme Court plainly regards them as sufficient to make the two-witness rule inapplicable". Just as "injuring our country" is one step removed from "adhering to or aiding the enemy", so an alleged attempt, as a protest, to damage items stored in a ROTC shed is at least the same distance away from "interfering with defense activities".

"Reason to believe" under § 2153(a) is not merely to wilfully injure government property. That element of the offense is stated by the words "did wilfully injure". A more specific "reason to believe" is essential under the statute. As stated in *Schmeller* v. *U. S.*, 143 F.2d 544, 553 (involving destruction of war material), "But the controlling question is not whether wilfulness was exhibited but whether there was a wilful violation of the statute". There had to be substantial evidence that defendant had some knowledge that would reasonably lead him to believe his alleged act would substantially interfere with activities directly related to declared or undeclared war and that he had reason to believe the building was "war premises" and the articles were "war material" under the statute. Otherwise the act charged would have been merely attempted arson or destruction of government property, not requiring the specific intent. There was no evidence against defendant on these points.

In *U. S.* v. *Stewart*, supra, the accused was found guilty of violation of 18 U.S.C. § 2155. On appeal the evidence was held insufficient to convict on the count of attempting to wilfully destroy an aircraft "with intent to injure, interfere with or obstruct the National Defense of the United States". The court said: "There is evidence from which it might be inferred that he attempted to injure or destroy a specific aircraft engine and that engine was properly classified as 'National Defense material'. However unless the necessary intent to commit sabotage can be reasonably inferred from the fact of the act itself, the accused's conviction must fail for lack of sufficient evidence". In *U. S.* v. *Meeker*, supra, the charge was violation of § 2155 in that the accused with intent to interfere with the National Defense attempted to injure a Navy aircraft. Guilty finding was reversed on appeal, for in-

sufficient evidence of intent to interfere with the National Defense.

In *U. S.* v. *Reyes*, supra, an air force enlisted man was charged under § 2155 with wilful injury to a B-52 aircraft alleged as "National Defense material", "with intent to interfere with the National Defense". Conviction was reversed on appeal among other grounds for failure to admit evidence as to the aircraft's mission. Although a combat aircraft, the court considered whether the aircraft was on alert status as relevant to the issue of intent to interfere with National Defense.

III

Importance of Questions Presented and Conflict with Other Federal Decisions.

Although the judgment of the Court of Appeals is non-final in nature in that it remanded the case to the District Court for a new trial, this court should nevertheless take jurisdiction because of the important and clear-cut issues of law presented affecting the trial court's jurisdiction. *Land* v. *Dollar*, 330 U.S. 731, 734; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685. The judgment herein presents novel and important questions of law and if petitioner's position is sustained will render the lower court's decision wholly void and obviate the necessity of a new trial. *American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372.

There is a clear conflict between the use of 18 U.S.C. § 2153(a) in the instant case and the frequent use of 18 U.S.C. § 2155 by other federal courts in comparable cases. The relationship between these statutes has never previously been judicially construed. In view of the difference of 20 years between the maximum sentence under

§ 2153(a) and that under § 2155, the applicability of the appropriate statute is of major concern in the administration of criminal justice. Except for the three indictments by the same grand jury arising out of the same episode at Washington University on May 4-5, 1970, § 2153(a) has never been the basis of an indictment by any other grand jury, to the best of petitioner's knowledge. On the other hand § 2155 has frequently been the basis of charges in similar circumstances.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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June 16, 1972

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1392.

United States of America,
Appellee,
v.
Joel Achtenberg,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

April 3, 1972.

Before VAN OOSTERHOUT and STEPHENSON, Circuit Judges, and REGISTER, Senior District Judge.*

VAN OOSTERHOUT, Circuit Judge.

Defendant Joel Achtenberg has taken this timely appeal from his conviction by a jury on an indictment charging violation of 18 U.S.C.A. § 2153(a) and the resulting sentence of fifteen years imprisonment imposed. The indictment charges:

> "That on or about May 4-5, 1970, at which time there was in force and effect at all times a state of national emergency proclaimed by the President of the United States, at St. Louis County, in the State of Missouri, and within the Eastern District of Missouri,

*Judge Register by reason of his death did not participate in the writing of the opinion or the final determination of this case but concurred in the result in conference.

with reason to believe that his act might injure, interfere with and obstruct the United States in preparing for and carrying on defense activities, did willfully attempt to injure and destroy, by fire, war premises and war material as defined by Section 2151, Title 18, United States Code, to wit: the United States Army Reserve Officers Training Corps facility at Washington University, St. Louis County, Missouri, and articles contained therein, intended for the use of the United States in connection with defense activities.

"In violation of Section 2153(a), Title 18 United States Code."

Section 2153(a) reads:

"Whoever, when the United States is at war, or in times of national emergency as declared by the President or by Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years or both."

This case arose out of a series of incidents occurring on the Washington University campus in St. Louis during the late evening of May 4, 1970, and the early morning of May 5, 1970. A confrontation of students by troops at Kent University on May 4, 1970, had resulted in the death

of four students. Students assembled at the quadrangle on the Washington University campus to protest the Kent incident, the presence of ROTC on the campus and the conflict in Vietnam. Shortly before midnight the assembled crowd, including the defendant, proceeded to the area on the campus where the Air Force and Army ROTC buildings are located. Various destructive activities occurred, including setting fire to the Air Force ROTC building and the Army ROTC building. The charges against the defendant relate only to the Army ROTC building.

A crowd assembled at the ROTC building area which included demonstrators, spectators, faculty members and University policemen. More than one thousand people were present. Several of the demonstrators broke open the door to the Army ROTC building. Some demonstrators set fire in the building. University policeman Abernathy was the only witness to give testimony connecting the defendant with the fire setting. He made his observations from a point 115 feet from the building. He testified that there was a small bonfire about 85 feet from the building and about thirty feet distant from him and that he observed the defendant make two trips into the ROTC building carrying fire in his hands from the bonfire. He further testified that he saw flames arise in the building shortly after the defendant entered it and saw defendant come out of the building without the fire. The nature and quantity of burning material is not disclosed.

A number of other witnesses offered by the Government testified that they did not see defendant carry fire to the building but that they did see some other persons do so. Some of such witnesses were faculty members and University policemen and were in a position to observe persons carrying fire to the building.

Defendant appeared as a witness and admitted participating in the march and demonstration but denied that he carried fire to the building or that he commenced any fire in the building, or that he had entered the building. Evidence was received that an attempt had been made to burn part of the gun cage in the ROTC building and that a two-by-four partition board was charred, and that two fatigue uniforms were burned.

The Army ROTC building belongs to Washington University. It is not a government building. It was used principally for ROTC training. Certain supplies in the building were property of the United States. An inventory of such property received in evidence discloses that the building contained 47 M-1 and M-14 rifles, office supplies, equipment, helmets, tents, uniforms and other equipment.

Defendant as a basis for reversal asserts the court committed prejudicial errors in the following respects:

I. Overruling a motion to dismiss the indictment upon the ground that § 2153(a) is vague and overbroad, and violates the First and Fifth Amendments.

II. Overruling timely motions for acquittal.

III. Denial of motions for discovery and additional discovery.

IV. Refusal of requested instructions and errors in instructions given.

V. Prejudicial statements by prosecutor not supported by evidence made in closing argument.

VI. Permitting improper cross-examination of defendant.

VII. Cumulative effect of asserted errors.

For reasons hereinafter stated, we reject defendant's contention that the statue under which he was indicted is

unconstitutional and his attack upon the sufficiency of the evidence to support a conviction. We uphold defendant's claim that prejudicial errors were committed depriving him of a fair trial and entitling him to a new trial.

I.

We are indebted to counsel for providing us with a legislative history of 18 U.S.C.A. §§ 2151, 2153 and 2155 at our request. A brief resume of the legislative history is in order. The basic Sabotage Act, now codified as § 2153 (a), was passed during World War I in 1918. 40 Stat. 533. It was designed to apply only in time of war and to make acts detrimental to the war effort which are already proscribed by state law offenses under federal law. See H.R.Rep. 11, 65th Cong., 1st Sess. The statute was amended and expanded in 1940 by 54 Stat. 1220 to afford protection of national defense activities against sabotage at times United States was not at war. The main part of such amendment is codified in 18 U.S.C.A. § 2155. Section 2155 differs from § 2153 principally in that it omits the requirement of war or declaration of war emergency and that it provides a ten year maximum penalty rather than thirty years.

In 1953 Congress by 67 Stat. 133 amended § 2153 by adding the phrase "or defense activities" after the words "carrying on the war" wherever they appeared in § 2153 and by adding the phrase "or defense activities" at the end of the definition of war material wherever that appeared in § 2151. Also added was a provision now incorporated in § 2157 reading:

> "The provisions of sections 2153 and 2154 of this title, as amended and extended by section 1(a) (29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-

third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under any of these provisions when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for."

The state of emergency proclaimed by the President on December 16, 1950, has not been terminated either by the President or by concurrent resolution of Congress. See *Sardino* v. *Federal Reserve Bank of New York*, 2 Cir., 361 F.2d 106, 109. In our view, the statute contemplates a termination of the emergency only by act of the President or by concurrent resolution of Congress. No presidential proclamation or Congressional concurrent resolution has been enacted to terminate the emergency. Thus § 2153(a) is in effect and operative in the situation presented by this case.

Defendant in his attack on § 2153(a) as unconstitutional, vague and overbroad states:

> "The vague terms are 'defense activities', 'reason to believe', 'national emergency', 'preparing for', 'war material' and 'war premises'. Both the terms themselves and the manner in which they are interlinked or applied in the statute, create the constitutional infirmity."

National defense materials are defined in § 2151. The definition clearly includes much of the government prop-

erty such as guns and clothing stored in the ROTC building. National defense premises as defined in § 2151 include places where national defense material is stored. The scope of the national emergency and defense activities are covered by the statute, its legislative history and the President's proclamation. The statute and its legislative history show that Congress intended the coverage to be broad.

It may well be that the Act was not designed primarily to cover a situation such as here presented where minimal damage is imposed on the defense effort by the acts bringing the charge within possible coverage by the statute. There is no language in the statute which limits coverage to situations where the damage is severe. The statute proscribes attempts and hence would cover situations where an attempt was unsuccessful, and no damage at all resulted.

In *United States* v. *Mechanic,* 8 Cir., ... F.2d ..... (December 22, 1971), we stated:

> "A statute may not forbid the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). It will be found void for vagueness and overbreadth if it fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. *Palmer* v. *City of Euclid,* 402 U.S. 544 (1971). We think that § 232, read in conjunction with § 231(a)(3), is sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden under it."

We are satisfied that such test is met in our present case.

II.

The court properly denied defendant's timely motions for acquittal. The evidence must of course be viewed in the light most favorable to the government as the prevailing party. The government has produced substantial evidence to support all essential elements of the offense. The most troublesome issue is whether the government has produced substantial evidence to support a finding that the defendant attempted to set fire to the ROTC building. Of the one thousand people present at the scene, only Captain Abernathy identified the defendant as a person who applied fire to the Army ROTC building. His testimony is substantially impeached by cross-examination. Captain Abernathy was positive in his testimony that the defendant set fire to the building. His testimony, if believed, is adequate to support a finding against the defendant on the fire setting issue. The issue of Abernathy's credibility is one for the jury to resolve. We cannot say as a matter of law that the evidence was insufficient to support the conviction. See *United States* v. *Mechanic*, supra.

III.

Defendant made repeated requests for Grand Jury testimony and for evidence in FBI statements favorable to the defendant. The court sustained the request to the extent that the government was required to disclose testimony in its hands favorable to the defendant and otherwise overruled the discovery request. The United States Attorney took the position that the Grand Jury transcript and the FBI statements contained no information favorable to the defendant. Counsel disagreed as to what constitutes favorable testimony. Defendant regarded testimony of witnesses present at the scene and in a position to observe who did not see defendant carry fire favorable,

while the United States Attorney regarded such testimony as negative testimony. Ultimately the United States Attorney produced excerpts of the Grand Jury testimony and FBI statements of some witnesses who did not identify defendant.

Defendant renewed the motion for full disclosure on the basis that they were not able to evaluate the testimony without a complete record of it. The United States Attorney had a complete transcript of the Grand Jury testimony. Transcripts of government witnesses were presented to the witnesses for examination before they testified. The court refused to make the Grand Jury testimony of defense witnesses available to defendant but on offer of the United States Attorney permitted defendant's witnesses to review their testimony in the court's chambers in the presence of the court but in the absence of counsel.

Additionally, defendant asserted a particular need for the Grand Jury testimony by reason of the fact that two previous indictments returned by the Grand Jury against the defendant were dismissed prior to the return of the indictment upon which he was tried. A need to examine the testimony of the government's witnesses for impeachment purposes was asserted. Defendant contended that Abernathy had identified as a participant in setting the fire a person whom it was later established was in jail at the time of the incident.

A need for discovery because of the numerous potential witnesses and the fact that the student witnesses had scattered after the school year were asserted. Defendant's contention was that the government had superior ability through the FBI to contact possible witnesses and that the time and expense of defendant in obtaining interviews with the many prospective witnesses would be prohibitive.

We believe that the defendant has shown a particularized need for more of the Grand Jury testimony than was provided him under the liberalized standards set forth in *Dennis* v. *United States*, 384 U.S. 855, and *National Dairy Products Corp.* v. *United States*, 8 Cir., 384 F.2d 457. As stated in *Dennis*:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." 384 U.S. 855, 873.

Defendant requested an in camera inspection of the Grand Jury testimony by the court. If the disclosure of any of the Grand Jury testimony would adversely affect the public interest, such portion could be withheld by the court in connection with the in camera request.

IV.

Defendant submitted numerous requests for instructions which were denied and also excepted to many of the instructions given. The court in its instructions sets out the indictment, quotes § 2153(a), and the definition of war material and war premises contained in § 2151, and then goes on to say:

> "Two essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> "First, the act or acts of attempting to injure, destroy, contaminate or infect any war material, war premises, or war utilities, when the United States is at war or in times of national emergency as declared by the President or by Congress;

"Second, doing such act or acts willfully and with intent to injure, interfere with or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or with reason to believe that his act may injure, interfere with or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities.

"It is the position of the Government in this case that on or about May 4-5, 1970, during a time of national emergency proclaimed by the President of the United States, the Defendant, Joel Achtenberg, and others, did willfully attempt to injure and destroy, by fire, war premises or war material, as defined by Section 2151, Title 18, United States Code, to-wit: The United States Army Reserve Officers Training Corps facility at Washington University, St. Louis County, Missouri, and articles contained therein. It is the position of Defendant that although he was present with many other individuals in the vicinity of the Air Force and Army ROTC Buildings during the early morning hours of May 5, 1970, that he in no way did attempt to destroy the Army ROTC Building and war materials contained therein by fire and participated in no acts designed to destroy the Army ROTC Building and war materials therein by fire.

"The evidence in this case raises the question of whether the Defendant was, in fact, the criminal actor and necessitates your resolving any conflict or uncertainty in testimony on that issue.

"The burden of proof is on the prosecution with reference to every element on the crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged in the indictment."

The above in substance constitutes the court's instructions on the offense charged, the elements thereof and the explanation of the elements. Defendant contends that there are eight essential elements of the offense, to wit:

> "(1) a national emergency declared by the president, (2) Defendant had reason to believe that his alleged act would injure, interfere with and obstruct the United States in preparing for and carrying on defense activities, (3) Alleged act was wilful, (4) Defendant attempted to injure and destroy the Army ROTC building and articles therein, (5) Attempt by fire, (6) Building was 'war premises' under the statutory definition, (7) The articles were 'war materials' under the statutory definition, and (8) the articles were intended for use in connection with defense activities."

Defendant urges that he is entitled to have such elements set out and explained to the jury and to have the jury clearly informed that he is entitled to an acquittal unless the government has proved beyond a reasonable doubt each essential element.

We believe the court committed error in classifying the crime as consisting of only two elements and in not adequately explaining such elements to the jury and advising them of the burden of the government to prove each element beyond a reasonable doubt. See *Johnson* v. *Bennett*, 8 Cir., 386 F.2d 677, 682; *United States* v. *Harris*, 4 Cir., 346 F.2d 182, 184; *Jackson* v. *United States*, D.C.Cir., 348 F.2d 772, 774. As stated in *Jackson*:

> "Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with

sufficient clarity to permit the jury to perform its duty intelligently. . . ." 348 F.2d 772, 774.

We find no cases construing the Act under attack. *Gorin* v. *United States,* 9 Cir., 111 F.2d 712, aff'd, 312 U.S. 19, discusses the interpretation of the somewhat related Espionage Act and sets out and discusses appropriate instructions on the meaning of national defense and other elements of the espionage offense. No comparable instructions were given in the present case.

The position instruction contained in the instructions hereinabove quoted also omits essential elements of the offense. It also contains the words "and others" following the defendant's name and could mislead the jury into believing that the defendant would be responsible for acts of others when in fact no conspiracy or joint responsibility has been charged.

From the court's statement of the defendant's defense, the jury could well infer that the defense rested solely on defendant's claim that he had not attempted to set the fire. In no place is it adequately stated that the government must prove the allegations of its indictment that the defendant set the fire with reason to believe that his act might injure or interfere with and obstruct the United States in preparing for or carrying on defense activities. Whether such allegation, which is an essential element of the offense, is established is a fact issue which the government is required to prove and the jury should have been so advised. See *Gorin* v. *United States,* 312 U.S. 19, 32.

Section 2153(a) provides as an element of the offense the alternate of "with intent to injure . . . war or defense activities" or "with reason to believe that his act may injure . . . war or defense activities." The indictment

charges the alternate "with reason to believe." There is a difference between intent and reason to believe. *United States* v. *Drummond*, 2 Cir., 354 F.2d 132, 152. The "intent to injure" instruction should not have been given.

Other attacks are made upon the instructions but we deem it unnecessary to prolong this opinion to discuss them.

V.

Defendant urges prejudicial error in four statements made by the prosecutor in his closing argument.[1] We shall refer to but two of such statements. The prosecuting attorney stated, "Three witnesses testified that the defendant waved to the crowd, 'Come on, guys, let's go, let's destroy the building.' Jerry Koester, Trudy Spigel and this morning—." Mr. Achtenberg objected, stating, "If the court please, I do not recall any evidence that anyone said, 'Let's destroy the building.' " The court ruled, "Ladies and Gentlemen of the Jury, as the Court has previously instructed you, the opening statement of counsel and the closing statements of counsel are not evidence. The Jury heard the evidence and they will be guided by what was or was not said from the witness stand." At a later point the prosecutor, in response to the argument of defendant's counsel that the evidence disclosed only two burned fatigue clothes and a burned piece of wood, stated: "Also mention that this was all the damage that was in the building, that we brought it all in. Well, that isn't necessarily correct; there is other damage. It had been shown to the Defense. There is another piece of wood back there; there's some photographs of burnt stars on the desk. But that's really neither here nor there." The court disposed of this in substance by advising the jury that they alone are judges of what the evidence is.

1. The government in brief concedes such statements "may have better passed unsaid" but urges that the error was not prejudicial.

There is no record support for the statement, "let's destroy the building." The statement appears to be a deliberate misstatement on the part of the prosecutor who by reason of his familiarity with the case doubtless was completely aware of the scope of the testimony he referred to. The jury, after hearing testimony for a number of days, may well have difficulty in recalling precisely what a witness said and be influenced by the prosecutor's representation. The statement is critical because of the weakness of the Government's case on the issue of defendant starting the fire.

The second statement is an effort on the part of the prosecutor by his statement to enlarge the damage established by the evidence. It is clearly improper for the prosecutor to testify.

The court's treatment of the prejudicial statements did not cure the error. See *Robinson* v. *United States*, 8 Cir., 32 F.2d 505, 510; *United States* v. *Guajardo-Melendez*, 7 Cir., 401 F.2d 35; *Dunn* v. *United States*, 5 Cir., 307 F.2d 883, 886.

We believe the other two statements challenged to be improper but consider them less prejudicial than those discussed.

VI.

A close issue is presented on defendant's improper cross-examination issue. We are of the opinion that any error committed in the respect urged is not prejudicial and hence we omit discussion of the issue.

VII.

We believe that each of the errors discussed at points III, IV and V are prejudicial errors which deprived defendant of a fair trial and which require a new trial. We

are convinced that the cumulative effect of the errors is such as to make a reversal and new trial mandatory. We have held that the strength of the Government's case is an important factor to be considered on the prejudicial error issue. In *Homan* v. *United States,* 8 Cir., 279 F.2d 767, 771, we stated:

> "Errors of the trial court which may be prejudicial in a close criminal case, in the sense of being capable in such a situation of possibly affecting the result, can well be without any such rational possibility in a strong case, and thus not entitle the defendant to a reversal of his conviction. The reviewing court must, of course, be able to say with fair assurance that the errors complained of could not with natural operation in the total setting and proceedings had, be regarded as having possessed any influencing effect. Blackwell v. United States, 8 Cir., 244 F.2d 423, 431. 'If, [however], when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of congress' (presumably as a question of substantive or procedural due process). Kotteakos v. United States, 328 U.S. 750, 764-765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557."

We have previously pointed out that proof of defendant's attempt to burn the Army ROTC building is extremely weak and that it is dependent upon the credibility of a single witness whose credibility is challenged. Reliable persons present at the scene and in a position to observe testified that they did not see the defendant carrying fire to the building. If defendant actually made two trips of 85 feet to the building carrying fire, adequate opportunity to observe him was afforded. Abernathy's testimony with

respect to starting a fire in the building consists of the following:

"Q. What, if anything, did you observe Joel Achtenberg do at that time, sir? A. Observed him with some lighted material in his right hand going to the doorway right at this Gun Shed, go into this building. [Indicating].

"Q. And then what did you observe, sir? A. After a short period of time I observed him from this area and seeing the light through the window on this south wall of the building, observed the flicker of the light towards an upper area or wall inside the building. I saw the light of the illumination go out and I saw Joel Achtenberg leave the building and come back to this area here. [Indicating].

* * *

"Q. Now, after you observed him come out of this building without the flames in his hand did you observe him then, sir? A. Yes, sir.

"Q. What, if anything, did you observe him do at that time? A. I observed him hurriedly come to a location where there was a small bonfire right here and pick up another piece of flaming material and rush back into the building. [Indicating].

* * *

"Q. And what, if anything, did you observe him do then, sir? A. Observed him leave this area, rush back into the area of the Gun Shed, go into the door. Again, I could see the illumination of the material. That was formerly a darkened building. The illumination of what he had taken in there caused a blaze or a blaze to become ignited in that area. [Indicating]. And at that particular time it was just gaining more

illumination or a greater blaze and then he come running out laughing."

Assuming Abernathy saw what he said he saw, there is a minimal basis for inference that the illumination resulted from an act of the defendant rather than that of others whom the evidence establishes had lit fires in the building. Miss Milton, a student who testified that she was in the building much of the time while the fire setting was taking place, testified as to the fire setting activities of others and stated that Achtenberg was not in the building while she was there. She saw a person, not Achtenberg, throw some burning material over the partition in the gun shed area and that a board on the partition was still burning when she left. She had participated in extinguishing other fires that had been started.

When the *Kotteakos* test of prejudicial error is applied to the facts in this case, we cannot say that the errors committed did not substantially influence the verdict of the jury.

Reversed and remanded for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.